

LEO VI'S LEGISLATION OF 907
FORBIDDING FOURTH
MARRIAGES
AN INTERPOLATION IN THE
PROCHEIROS NOMOS (IV, 25–27)

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HAVING outlined the quarrel generated by Leo VI's fourth marriage (p. 161 ff.), I shall now concentrate on certain legal or legalistic aspects of the problem.

It may be useful to begin by reminding ourselves that the Church Fathers who condemned a third and also subsequent marriages in the most downright manner seem to have been uncertain about the penances that should be imposed in such cases.¹ Although they required "repentance by acts,"² they never made it absolutely clear whether the dissolution of an illicit marriage should be considered as a *conditio sine qua non* for receiving back into the Church the person who had contracted it.³ And, finally, although they constantly referred to third and subsequent marriages, which were tantamount to "polygamy" in texts prior to the tenth century, they never mentioned a fourth marriage *expressis verbis*.⁴

These loopholes in canon law had been exploited during the tetragamy quarrel in order to find arguments to support Leo VI's fourth marriage. They are all purely "legalistic" and, in the case of the tetragamy, both parties basically agreed on the interpretation of the canonic legislation. The only disagreement was as to whether or not a special dispensation (οικονομία) should be granted to Leo VI in order to permit him to enter the church again without requiring him to separate from his wife.⁵ But this particular question, and the magnitude it reached, once again raised the whole problem of the individual's right to remarry—a thorny issue over which canonical and civil legislation were long in disagreement.⁶

Where did civil law stand on this issue?

¹ St. Basil, canons 4, 50, 80; Council of Neocaesarea, canon 3; St. Gregory Nazianzenus, Oratio 37 (PG, 36, col. 292 B).

² St. Basil, canon 4; Neocaesarea, canon 3.

³ Canonical collections are inconsistent in respect to the degree of acceptability of third marriages. One version of the *kanonikon* of John Nesteutes of a relatively late date stipulates that a third marriage, although carrying a penance of five years, should not be broken, unless the partners had children from previous marriages: G. A. Rhalles and M. Potles, *Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων*, I–VI (Athens, 1852–59), vol. IV, p. 438; for the date, see E. Herman, "Il più antico penitenziale greco," *OCP*, 19 (1953), 70–127, esp. 108–9. On the other hand, an anonymous canon found in a 14th-century manuscript requires the dissolution of all third marriages and orders a light penance: B. Benešević, "Monumenta Vaticana ad ius canonicum pertinentia," *Studi Bizantini*, 2 (1927), 129.

⁴ We should not take into consideration here the canon attributed to the Patriarch Nicephorus I of Constantinople (806–15) formally forbidding fourth marriages: J. B. Pitra, *Iuris ecclesiastici Graecorum historia et monumenta*, II (Rome, 1868), 340. It has been demonstrated to be a much later text, probably of the 13th–14th century: M. Jugie, "Notes de littérature byzantine, III. Les canons disciplinaires attribués à Saint Nicéphore," *EO*, 26 (1927), 419–20.

⁵ See *Nicholas I, Patriarch of Constantinople, Letters*, ed. R. J. H. Jenkins and L. G. Westerink, DOT, II (Washington, D. C., 1973), 236; Nicholas Mystikos explains to the Pope that a dispensation cannot be granted when a sinner (in this case, Leo VI) has not yet ceased from committing his sin. It seems that this theory about dispensations (only *post factum*) constituted an important precedent in legal thinking in the Eastern Church: P. Raï, "L'économie dans le droit canonique byzantin des origines jusqu'au XI^e siècle," *Istina*, 18 (1973), 311.

⁶ J. Zhishman, *Das Eherecht der Orientalischen Kirche* (Vienna, 1864), is the classic work on the question of the right to remarry as conceived by the Eastern Church. Particular aspects of this question have been developed by E. Herman, *Εὐχὴ ἐπὶ διαγάμω*, *OCP*, 1 (1935), 467–89; *idem*, "De impedi-

The Testimony of Contemporaries

Before examining civil legislation as it has come down to us, it will be helpful to look into some of the texts that are relevant to our purposes—texts written in the heat of the quarrel, in particular by Arethas, archbishop of Caesarea, who was not only a great scholar and humanist⁷ but an authority on canon law as well.⁸

A. In 906, Arethas was strongly opposed to the tetragamy. He wrote to Leo VI with whom he was on fairly good terms and tried to convince him that his fourth marriage should be dissolved. He stressed the lack of precedents for such an affair stating that “a fourth marriage was unheard of,”⁹ and went on to support his statement: “So I say that neither the Fathers, nor civil laws can be cited for our purposes; which one of them has ever mentioned explicitly a fourth marriage? . . . On the contrary, those who purged the old [laws] condemned the third and thus completely rejected the following; and St. Basil would not even give the name of marriage to any union after the second. Is our Emperor going to commit for the first time an act shown to be most improper by the Purification of the Civil Laws which insulted and rejected the previous marriage . . . ?”¹⁰

B. Sometime later in 906, Arethas addressed a second letter to the Emperor on the same subject and used similar arguments, urging him to “respect, if

mentis matrimonialibus secundum codificationes iuris ecclesiastici recentes ‘orthodoxorum,’” *OCP*, 3 (1937), 247–48; *idem*, “De benedictione nuptiali quid statuerit ius byzantinum sive ecclesiasticum sive civile,” *OCP*, 4 (1938), 189–234; J. Darrouzès, *Documents inédits d’ecclésiologie byzantine* (Paris, 1966), 273 (a new text by the 11th–12th-century author Nicetas of Ancyra). One should also refer to the recent syncretical work of K. Ritzer, *Formen, Riten und religiöses Brauchtum der Eheschließung in den christlichen Kirchen des ersten Jahrtausends* (Münster, 1962) (French trans. under the title: *Le mariage dans les Eglises chrétiennes du Ier au XIe siècle* [Paris, 1970]). Cf. also P. I. Panagiotakos, Σύστημα τοῦ Ἐκκλησιαστικοῦ Δικαίου, III. Τὸ Ποινικὸν Δίκαιον τῆς Ἐκκλησίας (Athens, 1962), 567–72; and the detailed bibliography in A. Christophilopoulos, Ἑλληνικὸν Ἐκκλησιαστικὸν Δίκαιον, II (Athens, 1954), 159–60. Scholars who wrote on the tetragamy quarrel have also studied the legal foundations of the arguments of both sides; the most comprehensive study is by N. Itsines, *Patriarch Nicholas Mystikos and the Fourth Marriage of Leo VI, the Wise* (doctoral dissertation, 1973). A detailed list of second, third, and fourth marriages in Byzantium from the 10th to the 15th century is given by R. Guiland, “Les noces plurales à Byzance,” *Byzantinoslavica*, 9 (1947), 9–30 (reprinted in *idem*, *Et Byz* (Paris, 1959), 233–61. It is interesting for our purpose to remember that in the 8th century Constantine V had married three times with no major problems arising from this fact, and that at the end of the same century Constantine VI’s marriage to Theodote had already created a turmoil inside the Eastern Church: Theophanes, *Chronographia*, ed. C. de Boor, I (Leipzig, 1883), 443, 469–70; cf. v. Grumel, *Les registes des actes du patriarchat de Constantinople*, I, 2 (Istanbul, 1936), no. 368.

⁷ P. Lemerle, *Le premier humanisme byzantin* (Paris, 1971), 205–41.

⁸ Patricia Karlin-Hayter, “Arethas et le droit d’asile,” *Byzantion*, 34 (1964), 613–17.

⁹ R. J. H. Jenkins and B. Laourdas, “Eight Letters of Arethas on the Fourth Marriage of Leo the Wise,” *Ἑλληνικά*, 14 (1956), 356: text in *Arethae archiepiscopi Caesariensis scripta minora*, ed. L. G. Westerink, 2 vols. (Leipzig, 1968, 1972), II, 73, line 30–74, line 1: τὸ δὲ τέταρτον οὐ κατὰ παροιμίαν οὐτ’ ἄλλω τινὶ λόγῳ προσευπορούμενον.

¹⁰ Jenkins and Laourdas, *op. cit.*, 356. I give a more detailed English summary of the passage, which can be found in the Greek in *Arethae archiepiscopi Caesariensis scripta minora*, II, 75, lines 1–19: Ἀλλὰ γὰρ ἀκριβῶς σκοποῦντι . . . οὐδὲ περὶ τῶν προκειμένων καταληφθεῖεν οὐχ ἱεροὶ πατέρες, οὐ νόμοι πολιτικοὶ διατάγματα γράφοντες. ποῦ γὰρ τις τούτων ῥητῶς τέταρτον κατωνόμασε γάμον; . . . τούναντίον μὲν οὖν οἱ τοὺς παλαιούς ἀνακαθάραντες τῇ τοῦ τρίτου διαβολῇ τὸ ἐχόμενον πάνπαν ἀπεσκοράκισαν, Βασιλείῳ δὲ τῷ σοφῷ τὸν ὑπερεκπεσόντα τὸ μέτρον τῆς διαγίμης οὐκέτι τῷ τοῦ γάμου προσρήματι σεμνύνειν δοκεῖ. ὁ τοιγαροῦν καὶ πολιτικῶν ἀνακάθαρσις νόμων τῇ τοῦ προηγουμένου γάμου ὕβρει καὶ ἀποτρίψει ἀποπώτατον ἀνεδίδασκε . . . τούτου κατάρξαι σοί, τῷ καὶ ἡμᾶς αὐτοκράτορι . . .

not that Purification of the Civil Code effected before you [became emperor], at least your own work, the noble and wise decisions which you yourself once made on this subject."¹¹

C. In February 907, after having banished Nicholas Mystikos and the metropolitans, Leo VI urged Euthymius to become the new patriarch, for he knew that Euthymius would not insist on his separating from Zoe. He managed to overcome Euthymius' reluctance by means of a threat. With the support of several learned men he intended to issue a new law allowing third and fourth marriages which, if enacted, would be heresy since it would openly contradict ecclesiastical legislation. It was in order to prevent this law being put into force that Euthymius accepted the patriarchate.¹²

D. In 907, the Patriarch Euthymius and the metropolitans who gathered around him declared to the Emperor that not only fourth marriages but third ones as well were inadmissible and illegal, and thus prevented him from issuing a decree permitting them.¹³ This declaration must have been promulgated not long after Euthymius became patriarch, since it was one of the conditions under which he accepted the position.

E. Sometime after Euthymius became patriarch, probably in the third trimester of 907, Arethas returned from exile to Constantinople and entered into contact with the new Patriarch.¹⁴ This was a spectacular about-face for the leader of those who had previously opposed any kind of dispensation, and explanations presumably were demanded. Arethas first wrote privately to his friends and former followers, to his own pupil Nicetas Paphlagon, for example, taking a rather strong stand against the Emperor's fourth marriage, and continued to express his opinion that a divorce followed by a penance would be a fair solution. Obviously a dispensation had not yet been granted to Leo.¹⁵ This, however, was done eventually by a synod in which Arethas

¹¹ Jenkins and Laourdas, *op. cit.*, 360. Text in *Arethae scripta minora*, II, 90 lines 24–27: αἰδέσθητε, εἰ καὶ μὴ τὴν πρὸ ὑμῶν ἀνακάθαρσιν τῆς πολιτικῆς Θεομοθεσίας, ἀλλ' οὐν αὐτὸ τοῦτο τὸ ὑμέτερον ἔργον καὶ τὰς κατ' ἐκεῖνο περὶ τῶν προκειμένων γενναίας ἀποφάσεις καὶ σώφρονας.

¹² Theophanes Continuatus, p. 371 (νόμον πονηρόν); Symeon Magister, p. 709 (αἵρεσιν ποιῆσαι καὶ νόμον); Georgius Monachus, p. 866 (αἵρεσιν καὶ νόμον ἐκθεῖναι); *Vita Euthymii patriarchae CP*, ed. Patricia Karlin-Hayter (Brussels, 1970), p. 97, line 32 (καὶ μέχρι αἰρέσεως καταντήσω); and Blastares, *Syntagma* (see following footnote).

¹³ Grumel, *Regestes*, no. 626; J. Hajjar, *Le synode permanent dans l'église byzantine des origines au XI^e siècle* (Rome, 1962), 112 note 144. Matthaios Blastares, *Syntagma*, Γ', chap. 4: Rhalles-Potles, *op. cit.*, VI (1859), 159: ὃς καὶ τὸν βασιλέα Θεσπίσαι βουλόμενον καὶ μέχρι τοῦ τετάρτου βαθμοῦ παρατείνεσθαι τοῖς βουλομένοις τὰ συνοικέσια, πάσῃ σπουδῇ διεκώλυσεν, οὐχ ὅπως τὴν τετραγαμίαν, ἀλλὰ καὶ τὴν τριγαμίαν ἀθέμιτον εἶναι μετὰ τῶν πλειόνων ἀρχιερέων διατεινόμενος.

¹⁴ Arethas was banished to Thrace on February 2, 907; there he found the time to compose a commentary on a canonical corpus (codex Vallicellianus 79 [F 10]), in which a scholion, obviously referring to his own exile, reads as follows: εἰ δὲ ἡδονὴν προτιμώμενοι κατεξανίστανται τῶν ἀρχιερέων καὶ κακῶσει ἐκδιδόασιν (*Vita Euthymii*, 205). On this manuscript, see Anna Meschini, *Il codice vallicelliano di Areta*, Università di Padova, Istituto di Studi Bizantini e Neogreci, Quaderni, 4 (Padua, 1972). The *Vita Euthymii*, 103, also states that Arethas asked to return to Constantinople after the fame of Euthymius' virtue had reached him; in other words, after Euthymius had given tangible proofs of the policy that he meant to follow as patriarch.

¹⁵ *Arethae scripta minora*, I, 306–11, 312–14, 315–19. These letters of Arethas show very well that Leo was not granted a dispensation immediately after Euthymius' accession to the patriarchal throne. Also, the *Vita Euthymii*, p. 109, lines 21–23, tells of Leo's admission into church not only after Arethas' return to Constantinople, but also after the adventures of Nicetas Paphlagon, who quarrelled with

participated, and new explanations became necessary. Arethas wrote two orations; in the first, and lengthier, he addressed the laymen; the second, read shortly after the first, was addressed to the bishops on St. Michael's feast, that is, on 6 September or 8 November 907.¹⁶ The arguments in both orations are more or less the same, and parts of both texts are identical. One of the arguments, repeated almost in the same words in both, reads as follows:¹⁷ "[Leo VI] openly descended to entreaty, attempting by every means to win us with his prayers and in the most pathetic terms begging that his fault alone be condoned, while promising to prevent others from doing similar deeds. This, after all, was our main concern and for that reason we hastened to restrain and prevent this act [because we thought] that it would be a great accusation against the ruler if he was believed to go as far as [to make] a law for his subjects out of the work of the Almighty. But since this was his attitude towards me, since this was what he was about to do and accomplish, what was I to do next in the very interest of peace? Drive him by my harshness to despair and to some further irrevocable action? . . ."

This is the text as it appears in the first oration. The second contains a variant that is important for our purposes. Instead of the phrase "this was what he was about to do and accomplish," we read in the second oration "since this was what he promised and accomplished."¹⁸ We may thus deduce that whatever Leo's promise was when the first oration was read, it was fulfilled shortly afterward, before the second oration was delivered.

F. The next text we shall discuss was certainly written after Leo's death in 912, most probably after February 914.¹⁹ Nicholas Mystikos, restored to the patriarchate in 912 and regent since June 913, had been ousted from the

Arethas over the tetragamy issue and retired to a cave in Medeia, near the Black Sea. He was arrested sometime thereafter by the strategos of Thrace, since he was thought to be about to desert to the Bulgarians; brought to Constantinople, he was put on trial because of his writings against the Emperor. He finally escaped imprisonment due to the personal intervention of Euthymius.

¹⁶ *Arethae scripta minora*, I, 1–12 and 13–18.

¹⁷ I am quoting from the English translation of the first oration made by Patricia Karlin-Hayter, *Byzantion*, 31 (1961), 288–90; however, I have modified parts of it in my efforts to follow the text as closely as possible, often at the expense of style. An important change in the interpretation occurs toward the middle of the quotation, which in Karlin-Hayter's translation reads as follows: "... while promising to keep the rest in restraint. This after all was our concern, to cut off [generalized moral relaxation] as the most damning accusation that can be brought against a ruler, if, at least, one believes that the ruler's job is to stand as law to his subjects." I am quoting here the Greek text (*Arethae scripta minora*, I, p. 7, line 23–p. 8, line 5) with the addition of only one phrase from the second oration (*ibid.*, p. 16, lines 18–19, here in brackets), because I think that this sentence is necessary for a better understanding of the text, and that it may have been omitted in the first oration by the scribe because of the *homoeoteleuton*: πρὸς ἱκετείαν περιφανῶς ἀποκεκλικότα, παντοδαπῶς ἡμᾶς ὑποποιούμενον ταῖς ἐντεύξεσιν καὶ πᾶσαν μὲν ἔλεεινὴν ἀφιέντα φωνὴν τὴν ἐπ' αὐτῷ μόνην συγγνώμην αἰτοῦσαν, τοὺς δ' ἄλλους ἐπέχειν τὰ τοιαῦτα παρεγγυώμενον· ὃ καὶ [ἡμεῖς μάλιστα ἐδεδίδμεν καὶ δι' ὃ τὴν πρᾶξιν ἀναχαιτίζειν καὶ] ὑποτέμεσθαι κατεσπεύδομεν, ὡς μέγιστον ὃν εἰς ἐπὶ κλίμα τῷ κατάρχοντι, εἴ γε τὸ τοῦ κρείττονος ἔργον εἰς νόμον προβαίνειν τῷ ὑπηκόῳ πεπίστευται. ἀλλ' οὕτω τούτου μοι διαγενομένου καὶ ταῦτα μόνον οὐ καταπράξαντος καὶ τετελεκότος, τίνα με εἰκός, ὦ πρὸς τῆς εἰρήνης αὐτῆς, τούντεῦθεν γενέσθαι; σκληρὸν σκληρῶς φέρεσθαι; πρὸς ἀπόγνωσιν καὶ τὸ δρᾶσαι τι τῶν ἀνηκέστων συνωθεῖν αὐτὸν ἔτι;

¹⁸ *Arethae scripta minora*, I, p. 16, lines 23–24: καὶ ταῦτα καὶ ἐπαγγελαμένου καὶ καταπράξαντος.

¹⁹ This latter date is proposed by Westerink in *Arethae scripta minora*, I, 122. It may be added here that the passage on p. 143, lines 14–16, is addressed ironically to Nicholas Mystikos who, because of the general political circumstances, is adopting a more conciliatory attitude. Therefore, there is no reason to assume that this text was written before Leo VI's death.

palace after Zoe's successful coup. He had written a pamphlet giving twenty-nine reasons as to why the fourth marriage of Leo VI should not be condoned. It is obvious that this pamphlet, written after Leo's death, was aimed at the metropolitans who had granted the dispensation in 907. Arethas, who was one of them, wrote a rebuttal that has come down to us. Nicholas' arguments are quoted verbatim and are followed, each in turn, by Arethas' refutation.²⁰

[IV 25. Nicholas] "To those who say that 'for the Emperor alone a fourth wife has been condoned, while for other persons this has been forbidden, and a law has been drawn up with fearful penalties, . . .'"²¹ Nicholas answers by quoting from the New Testament suggesting that one should first judge and discipline oneself before judging others. "If what the law says²² it says to those who are within the law, either he who lays down the law cares for the keeping of it, and then he too will be under the law and it will be necessary to obey him; or he is the first to make a mockery of his own law by tossing its command contemptuously aside, and then how can he fail to encourage his subjects to transgress rather than to abide the law?"²³

[Arethas] You are a hypocrite. "If you convict of transgression the first author of the law"²⁴ you should also convict Paul who condemned circumcision and yet circumcized Timothy. Among other things, you ignore "that on occasion the beginning and origin of laws is nothing but circumstances looking like something unlucky to the human way of life. As someone said, laws were laid down because something not allowed was committed; that is to say, they were meant to keep the citizens from the improper action henceforth, but without altering what has already occurred."²⁵ Following are examples taken from the Old Testament and from the Council of Trullo.

"But things being so, what reproach, if you are sensible, could you make to the Emperor if he, ignoring what one should do, entered into something that was not until then condemned, but debarred his subjects therefrom by means of his law?"²⁶ You too are responsible for the Emperor's misdoing, because

²⁰ This text was first published with an English translation by Patricia Karlin-Hayter, "New Arethas Documents IV," *Byzantion*, 32 (1962), 387-487; and then by Westerink in *Arethae scripta minora*, I, 122-77. I quote here Karlin-Hayter's translation, modifying it when necessary, and the Greek text as established by Westerink.

²¹ *Arethae scripta minora*, I, p. 171, lines 12-15: "Ὅτι πρὸς τοὺς λέγοντας «ἐπὶ μόνου τοῦ βασιλέως συγκεχώρηται ἡ τετάρτη γαμετή, ἐπὶ δὲ τῶν λοιπῶν ἀπείρηται προσώπων καὶ νόμος φοβερὰν τὴν ἀπειλὴν ἔχων ἐκτέθεται».

²² *Ibid.*, lines 21-27: εἰ δὲ ὅσα ὁ νόμος λέγει τοῖς ἐν τῷ νόμῳ λαλεῖ, εἰ μὲν ὁ τὸν νόμον τιθεὶς τῆς τοῦ νόμου πεφρόντικε φυλακῆς, ἔσται καὶ αὐτὸς ὑπὸ τὸν νόμον καὶ ἀνάγκη ἀκούειν αὐτοῦ· εἰ δὲ πρῶτος αὐτὸς λῆρον τὸ τοῦ οἰκείου νόμου ἐπίταγμα ποιεῖται δι' ὧν παρὰ φαῦλον ἔρριψε τὴν παραγγελίαν, πῶς οὐχὶ μᾶλλον πρὸς παράβασιν ἢ πρὸς συντήρησιν τοῦ νόμου προτρέπεται τοὺς ἀκροατάς;

²³ A similar argument is repeated by Nicholas in IV, 26 (*ibid.*, p. 124): if a fourth marriage is condoned for one emperor, it should be condoned for all emperors, and inevitably this unsound principle will be followed by the people, the more so as the legislator himself does not abide by his law.

²⁴ *Ibid.*, p. 172, lines 2-3: εἰ παραβάσεως κρίνεις τὸν πρῶτως ἐκτεθεικότα τὸν νόμον.

²⁵ *Ibid.*, lines 13-19: ὅτι τῶν νόμων ἔσθ' ὅτε ἀρχὴ τε καὶ γένεσις οὐκ ἄλλο οὐδὲν ἄλλ' ἢ πραγμάτων περίστασις, τὸ μὴ προσῆκον ὑποδυομένη τῆς κατ' ἀνθρώπους βιώσεως. ἐκ γὰρ τοῦ πράττεσθαι τι ὧν οὐ προσῆκεν (ὁ εἰπὼν πού) οἱ νόμοι ἐτέθησαν, φυλάττεσθαι δηλαδὴ τὸ ἀπὸ τοῦδε τοῖς πολιτευομένοις διασπελλόμενοι τὸ ἀπείσιον, ἀλλ' οὐχὶ καὶ τὸ φθάσαν ἐξαφανίζοντες.

²⁶ *Ibid.*, p. 173, lines 3-7: ἀλλ' ἐπειδὴ ταῦτα, πρὸς τίνα μέμψιν, εἰ σωφρονοίης, ἐναπολάβοις καὶ βασιλέα, εἰ τὸ πρὸ τοῦ μὴ δόξαν τοῖς φαύλοις ὑπάγεσθαι αὐτὸς μὲν ἀγνοία τοῦ δέοντος ἐπανείλετο, τῷ δ' ὑπηκόῳ διὰ τοῦ νόμου τὸ ταῦτόν ἀπετείχισεν;

of the counsel you gave him. "Then can any reproach subsist against him, and not rather the highest praise if, after recognizing how he himself was caught—by your former counsels, that is to say—by law he protects his subjects from the same reproach?"²⁷ You say that "not freed from his sin . . . he becomes law-giver! But know this, if he had relied on what you said and had not enquired further of those who have gone into the matter more exactly and more wisely than you did—those [same persons] whom you are now caught to offend—even this [i.e., the law] would not have materialized. But, as it is, he examined with wisdom the arguments of each, and, abominating your harshness, for which there is no authority, and delighted with the mildness of the others which conforms with the Truth and with the Fathers, he embraces the mean, choosing cleverly from both. On the one hand, he does not repudiate his wife, because there was no established reason compelling him to do so. But, on the other hand, since some of the popularity hunters who are always glad to attach themselves to vain innovations were scandalized, he draws up the law for his subjects . . ."²⁸

G. The last text we are going to quote is a poem, an *alphabetos* written in memory of Leo VI, most probably in 912/913 shortly after Leo's death.²⁹ Referring to the tetragamy quarrel, the anonymous poet writes:

Such strange pronouncement from on high
By Providence was rendered.
The child [Constantine VII] was born, but by this birth
Law's bounds were violated;
Thus Law was once suspended, but
Another was enacted,
And Leo let the Canon Law
Its judgment freely render.³⁰

Let us now try to piece together the information contained in the above texts concerning civil law's prescriptions about fourth marriages.

First, in 906, Arethas knew of no civil law that even mentioned a fourth marriage (cf. text A).

²⁷ *Ibid.*, lines 17–21: τίς οὖν μῶμος αὐτῷ ὑπολείπεται, ἀλλ' οὐχὶ μέγιστος ἔπαινος, εἰ μετὰ γνώσιν οἷς αὐτὸς ἑάλω ταῖς σαῖς δηλαδὴ πρότερον ὑποθήκαις, νόμῳ φυλάσσεσθαι τὸ ὑπήκοον ἀπείργει μὴ τοῖς ὁμοίοις εὐθύναςθαι;

²⁸ *Ibid.*, p. 173, line 24–p. 174, line 4: . . . ὥς μὴ τοῦ ἐφαμάрту διῆθεν ἀπηλλαγμένον . . . νομοθέτην γινόμενον; ἀλλ' εὖ ἴσθι, εἰ τοῖς σοῖς ἐναπεκάσθητο λόγοις μηδὲν πλέον τούτων ἀνευρηκῶς παρὰ τῶν σοῦ σοφώτερον ἡκριβωκότων—ἐν οἷς αὐτὸς πλημμελῶν εἰς τὴν παρούσαν καταλαμβάνη—οὐδὲν ἂν πρᾶγμα καὶ τοῦτο προβῆναι· νῦν δὲ συνέσει τοῖς λόγοις ἐπιβαλὼν ἑκατέρων καὶ τὸ μὲν σὸν ἀμάρτυρον ἀπηνὲς μυσσυχθεῖς, τὸ δὲ τῶν ἄλλων ἐπιεικὲς μετὰ τοῦ τῇ ἀληθείᾳ συναῖδεν καὶ τοῖς πατράσιν ὑπεραγάμενος, μέσος χωρεῖ τῶν πραγμάτων τὸ ἐξ ἑκατέρου δεξιώτερον ἀσπασάμενος. καὶ τὸ μὲν κῆδος οὐκ ἀπωθεῖται, ὅτι μηδὲ τις τῶν καθεστηκότων τοῦτο κατηνάγκαζε λόγος· ἐπεὶ δὲ τισι τῶν δοξοκόπων σκάνδαλον ἐνεποίει, φιλοφύλων αἰ ταῖς διακείνοις καينوλογίαις προσφύεσθαι, γράφει τοῖς ὑπὸ χεῖρα τὸν νόμον . . .

²⁹ Published with English translation and commentary by I. Ševčenko, "Poems on the Deaths of Leo VI and Constantine VII in the Madrid Manuscript of Scylitzes," *DOP*, 23–24 (1969–70), 201–10; for the date, see *ibid.*, 222–25.

³⁰ Translated by Ševčenko, *op. cit.*, 204–5. The crucial lines (45–46) of the Greek text read as follows:
'Ο νόμος εἰ καὶ ἤργησε, πάλιν ἐνομοθέτει·
τῷ ἱερῷ κανόνι δέ, τὸ κρίνειν παρεχώρει.

Second, he knew only of laws that condemned a third marriage and thought that they should apply *a fortiori* to a fourth. They were: a law contained in the "purification of civil laws," issued before Leo's accession to the throne (cf. texts A and B); and a law issued by Leo himself (B).

Third, in 907 Leo was considering the idea of issuing a new law to allow third and fourth marriages, although this would create open contradiction between civil and ecclesiastical legislation (C). He was prevented by the Patriarch Euthymius and the synod, who issued a declaration on this subject (D).

Fourth, in order to obtain a dispensation, Leo promised to prevent by law anyone else from contracting a fourth marriage (E). Eventually he issued a law "with fearful penalties," formally forbidding fourth marriages (E, F, G); in so doing, he followed the advice of the Patriarch and the synod (F: the persons who were offended by Nicholas Mystikos in 914): this is the document mentioned in our text D, and alluded to at the end of our text G. The new law naturally had no retroactive power; consequently Leo was not compelled to divorce his fourth wife, especially since the Church Fathers did not hold any "established reason" for him to do so (F; cf. *supra*, p. 176).

From the above text it is easy to conjecture that a bargain was made in 907. Euthymius and his partisans accepted the responsibility of Church administration provided the Emperor would ban fourth marriages in the future by means of a law. This decree was eventually issued, undoubtedly before the Patriarch agreed to crown Constantine VII coemperor (15 May 908). Thus, its issuance can be dated with accuracy to the span of time between Arethas' first oration of 907 (E: dispensation granted because Leo promised to issue a law) and his second oration (the law had been issued) which was read on 6 September or 8 November in the year that can now be safely considered to have been 907. In other words, Leo's novella against a fourth marriage had been issued sometime in the second half of 907, certainly before 8 November. It seems to me that the above texts E, F, and G are explicit enough to show that this law of 907 had nothing to do with Leo's novella 90 against third marriages, issued long before the tetragamy question had arisen.

Civil Legislation Concerning Subsequent Marriages

I. Justinian's legislation adhering to the principle of Roman law that a marriage is simply the result of the mutual consent of the parties concerned contains no limitation as to the number of times an individual is allowed to remarry. Its only concern is to regulate the rights of inheritance for children of previous marriages.³¹

II. The Isaurian *Ecloga*, issued probably on 31 March 726,³² contains no provisions concerning third or fourth marriages. Two chapters (II, 10 and 11)

³¹ Cod. Just. V, 9, 6; Just. Novella 22.

³² D. Ghines, 'Ο ὑπ'ἀριθ. 121 κώδιξ τῆς μονῆς Ἀγ. Νικάνορος (Ζάβορδας) καὶ δύο χρονολογίαι: τῆς Ἐκλογῆς τῶν Ἰσαύρων καὶ τοῦ Προχείρου Νόμου, in Ἑτ.Ἑτ.Βυλ.Σπ., 30 (1960-61), 351-52; and V. Grumel, "La date de l'Eclogue des Isauriens: l'année et le jour," *REB*, 21 (1963), 272-74. Cf. also the general remarks of B. Sinogowitz, *Studien zum Strafrecht der Ekloge* (Athens, 1956).

deal with persons contracting a second marriage (δευτερογαμία) and are also mainly concerned about the inheritance of the offspring of the first marriage. In my view, the Isaurian legislator has codified in these chapters Justinian's novella 22, since both texts contain similar provisions and both speak of δευτερογαμία but often refer to "previous marriages" in the plural, allowing us to assume that δευτερογαμία should be understood in the broader sense of "re-marrying," not as referring strictly to a "second" marriage.³³ Instead, the omission of any direct reference to marriages after a second one was understood by the Byzantines and by modern scholars to indicate silent condemnation of third and subsequent unions.³⁴

III. There is a novella attributed to the Empress Irene (797–802) which can be summarized as follows: We must respect all that is written in the Holy Scripture. Therefore, we have already confirmed what is said in the Second Title [of the *Ecloga*], which mentions a second marriage and no other, for it follows the teaching of St. Paul. "This is why we decree that nobody can marry three times or more, because such a union is foreign to the Apostle's teaching as well as to the Christian concept of marriage." It is also forbidden to all, especially to those holding office, to take as their lawful wives their own slaves. "If anyone contravenes the present [law], his marriage will be illegal and the children born of it will be considered illegitimate."³⁵

The attribution of this novella is doubtful. It is based on the fact that in some manuscripts it follows another novella of Irene, and on a rubrica of the table of contents of cod. Marcianus gr. 179 (13th century: the text of the novella itself is not preserved in the Marcianus) it is attributed to ὁ αὐτὸς βασιλεὺς, with reference to the previous item, which is a novella of Irene. But this attribution is contradicted by an annotation in the same cod. Marcianus which says that this novella "is earlier than the time of the Empress Irene."³⁶ Moreover, the twelfth-century compiler of the *Ecloga ad Prochiron mutata* has thought it appropriate to attribute this same text (the "novella of Irene") to Justinian³⁷—an attribution that is certainly false. Be that as it may, the preserved text of the novella shows that it is legislation posterior to

³³ For this reason, we should by no means emend the text of the manuscripts and correct προτέρων γάμων to προτέρου γάμου, as has been proposed by D. Ghines, Ζητήματά τινα ἐκ τῆς Ἐκλογῆς τῶν Ἰσαύρων, in Ἑπ.Ἑτ.Βυλ.Σπ., 10 (1933), 42. This correction is based on how this law was understood later; see following footnote.

³⁴ Ghines, *ibid.*, who cites an addition found in the codex Bodleianus 204 of the *Ecloga*, which states that there is no law concerning third marriages and that one should refer to St. Basil on this question. The novella attributed to Irene, which we are going to discuss *infra*, also states that "previous legislation mentions only second marriages." See D. B. Mposdas, Περὶ τοῦ γάμου. Συμβολὴ εἰς τὴν μελέτην τοῦ γάμου κατὰ τὴν Ἐκλογὴν τῶν Ἰσαύρων (Athens, 1937), 47; and G. Cassimatis, "La notion du mariage de l'Eclogue des Isauriens," Μνημόσυνα Παπούλια (Athens, 1934), 25–92.

³⁵ Zepos, *Jus*, I, 49–50 = Rhallés-Potles, V, 252. Cf. F. Dölger, *Regesten der Kaiserurkunden des oströmischen Reiches*, no. 359. The passages relevant to our purpose read as follows: . . . Διὸ ὀρίζομεν παντὶ τρίτον συνοικέσιον καὶ ἐπέκεινα μὴ γίνεσθαι, ὥς ἀλλότρια τῆς θείας ἀποστολικῆς διατάξεως καὶ ξένα τῆς χριστιανικῆς ἀγχιστείας . . . Ἐάν γάρ πλημμελήσῃ τις ἀπὸ τοῦ παρόντος, παράνομον εἶναι τὸ συνοικέσιον καὶ τοὺς τικτομένους ἐκ τῶν τοιούτων γάμων παῖδας νόθους τυγχάνειν.

³⁶ See the discussion in J. Mortreuil, *Histoire du droit byzantin*, I (Paris, 1843), 352–54.

³⁷ Zepos, *Jus*, VI, 286.

the Isaurian *Ecloga* which it partly endorses and partly corrects;³⁸ and, moreover, it contains no explicit mention of a fourth marriage, although this is obviously included in the expression "third . . . or more" (καὶ ἐπέκεινα).

It should be added here that the provisions of this novella did not find any place in the official legislation of the Macedonians;³⁹ and, as we shall see, they were later watered down by Leo VI. It may thus be assumed that this novella, although it was not abolished, was not considered to be of prime importance in the second half of the ninth century.⁴⁰

IV. The *Procheiros Nomos*, the first Macedonian code of civil law issued sometime between 870 and 879, probably in 872, contains a paragraph formally forbidding fourth marriages but saying nothing about third ones. Since I believe that this paragraph is part of an interpolation, I shall discuss it later (p. 185).

V. Leo VI promulgated a law condemning third marriages: it is novella 90 addressed to Stylianos Zaoutzes and consequently datable before the latter's death in mid-899—most probably considerably earlier and before the death of Leo's first wife Theophano († 896 or 897). The Emperor, having expressed his disapproval of second marriages, condemns third ones: "[Human nature] rushes into a third marriage after the second, knowing that there is no punishment for this action; it does not take into account the penance attached to the third [marriage], the more so since, I do not know why, civil law has not sought to be in agreement with the Holy Spirit's decree, and does not condemn those who were not content with a second marriage. Consequently, We, following the teachings of the Holy Spirit, order that those who contract a third marriage should be subject to the punishment decreed against them by Holy Canon."⁴¹

In spite of its strong language, Leo's novella is considerably milder than the previous "novella of Irene," which it ignores. Leo "legalizes"—and thus renders enforceable—the penance attached to third marriages by Canon Law; but he contests neither the validity of the third marriage once celebrated,⁴² nor the legitimacy of the children that may be born therefrom.⁴³

³⁸ The clause concerning the marriage of slaves to free people contradicts *Ecloga* VIII, 3. The one concerning third marriages completes what is written in *Ecloga* II, 10 and 11, and could have been inspired by Constantine V Copronymos' third marriage.

³⁹ The clause concerning remarriage will be discussed below; that concerning marriage between a free man and his own slave is contradicted in *Procheiros Nomos* V, 4, and *Epanagoge* XVI, 20, 25.

⁴⁰ This may be the reason why the Nomokanon, as revised in 883, did not take this novella into consideration when examining the right of individuals to remarry (XIII, 2, in Rhalles-Potles, *op. cit.*, I, 275 ff.; cf. H.-G. Beck, *Kirche und theologische Literatur im byzantinischen Reich* (Munich, 1959), 146; and J. Gaudemet's article "Nomokanon," in *RE*, Suppl. 10 (1965), 417–29.

⁴¹ P. Noailles and A. Dain, *Les nouvelles de Léon VI le Sage* (Paris, 1944), 297–99 (with French translation): ἡ φύσις . . . πρὸς τρίτον γάμον ἐκ τοῦ δευτέρου προάγεται τῷ μὴ δίκην ἐπὶ τούτῳ ἀπαιτηθῆναι, καὶ τῆς κειμένης ἐπὶ τῷ τρίτῳ ἐπιτιμῆσεως καταφρονήσασα, μάλιστα γὰρ καὶ πολιτικοῦ νόμου, οὐκ οἶδ' ὅπως, μὴ συμφωνεῖν ἐβέλησαντος τῷ δόγματι τοῦ Πνεύματος, ἀλλὰ μέμψεως ἀφιέντος τοὺς μέχρι τῆς δευτέρας γαμικῆς μὴ στέργοντας κοινωνίας. Τοιγαροῦν ἡμεῖς τοῖς τῷ Πνεύματι δοκοῦσιν ἐπόμενοι ὀρίζομεν τοὺς εἰς τριγαμίαν καταστάντας ὑποκείσθαι τῇ δίκῃ, ἣν περὶ αὐτῶν ὁ ἱερὸς κανὼν ἐξενήνοχεν.

⁴² Leo VI himself in his novella 89 for the first time has made compulsory the ecclesiastical blessing for all marriages. The modalities of such a blessing for second or third marriages have been studied by Herman (see articles referred to *supra*, note 6).

⁴³ Leo's novella 100 also tones down "Irene's novella" as far as marriages between free men and slaves are concerned.

If for the time being we disregard the *Procheiros Nomos* mentioned above, we can easily recognize the two laws condemning third marriages to which Arethas refers in 906 (*supra*, pp. 176–77): they are the “novella of Irene” and that of Leo VI which, in fact, condemn third marriages and do not explicitly mention a fourth marriage. According to Arethas’ statement, the first of these laws was issued before Leo’s accession to the throne (i.e., before 886) and was part of a “purification of civil laws.” This is a very significant expression in its ninth-century context. It cannot but refer to the major legislative effort undertaken by Basil, the Macedonian, Leo’s father, to purge the voluminous legislation of contradicting laws and of laws that were no longer valid, and to make the practice of laws simpler for everyday use.⁴⁴ Basil himself refers to this ἀνακάθαρσις in the prefaces to the *Procheiros Nomos* and the *Epanagoge*:⁴⁵ the traditional legislation being too complicated, and the Isaurian *Ecloga* being abhorred (ἀποτρόπαιος) and foolish (φληναφίς), he decided to renew and correct it all; the laws that were abolished were collected in one volume (τεῦχος) while those that remained valid were classified in detail (πλάτος τῶν νόμων) in a vast work consisting of sixty (or forty) books destined for the use of scholars. For practical purposes, he issued the *Procheiron*, which contained in forty “titles” only those laws that were necessary and in common use; that is to say, it was a manual for everyday practice of law. It is important for our purposes to stress that the scholarly ἀνακάθαρσις—which supposedly constituted the basis of the *Basilica* published by Leo VI—is clearly distinguished from the *Procheiron* and the *Epanagoge*. Consequently, we do not have to look into these two handbooks in order to find the law which, as Arethas says, was part of the ἀνακάθαρσις. On the contrary, we may assume that the “novella of Irene”—which, incidentally, is a complementary correction of the Isaurian *Ecloga*—could not but find a place inside the vast and scholarly “purification of the old laws” ordered by Basil I.

It may be added here that Leo VI continued his legislative work along the same lines as his father’s, and that his collection of 113 novellae is placed under the title αἱ τῶν νόμων ἐπανορθωτικαὶ ἀνακαθάρσεις.⁴⁶ The novellae themselves are mainly concerned with correcting or abolishing old laws, and with assigning legal power to existing customs, thereby bringing them into the body of the law. Thus, the task of “purifying” the old legislation continued under Leo.⁴⁷ This ambiguous situation could explain the inconsistency in Arethas’ references to previous legislation forbidding third marriages: in text A he speaks only of the ἀνακάθαρσις (i.e., all the purification of the laws made until 906, including Leo’s legislation), while in text B, he distinguishes between the ἀνακάθαρσις which preceded Leo and the laws which were issued by him. In any case, he

⁴⁴ Theophanes Continuatus, 262–63.

⁴⁵ Zepos, *Jus*, II, 116, 117, 237.

⁴⁶ Noailles and Dain, *Les nouvelles de Léon VI le Sage*, 5.

⁴⁷ The question of the ἀνακάθαρσις has been studied in detail by C. E. Zachariae von Lingenthal, ‘Ο Πρόχειρος Νόμος, *Imperatorum Basilii, Constantini et Leonis Prochiron* (Heidelberg, 1837), LXXXIV–XCIV. Cf. also H. J. Scheltema, “Byzantine Law,” in *CMH*, IV, 2 (Cambridge, 1962), 65ff., and G. Ostrogorsky, *History of the Byzantine State* (New Brunswick, N. J., 1957), 212–19.

seems to ignore any law which specifically mentions a fourth marriage. In other words, he ignores *Procheiron* IV, 25, which formally forbade a fourth marriage, and which, as we shall try to demonstrate, is an addition made in the early tenth century.

The Interpolation in the Procheiros Nomos IV, 25–27

My argument is based on internal as well as external evidence, which will be examined separately.

INTERNAL EVIDENCE. As I have said before, the *Procheiros Nomos* is a code of law issued between the years 870 and 879, probably in 872. The relevant paragraphs are the last ones of title IV, numbered 25, 26, and 27. First, I propose to translate them;⁴⁸ then, in the commentary, I shall try to point out the elements in the text which induce me to consider it as belonging to Leo VI's legislation of 907 concerning fourth marriages.

[*Procheiron* IV, 25] "A law was laid down by the ancients, and confirmed by the most pious Justinian, whereby those who wished might extend cohabitation as far as a fourth marriage; he had in mind, no doubt, that to many persons it naturally happens that their partners in marriage die early when they themselves are still youthful, and nothing can resist their natural desires; so that it happens to such that they are debarred from chaste wedlock, and turn to forbidden intimacies. We, who have been subject to the same nature and

⁴⁸ The *Procheiros Nomos*, issued under the names of the Emperors Basil, Constantine, and Leo, should be dated between 6 January 870 (coronation of Leo as coemperor) and 3 September 879 (Emperor Constantine's death). According to a manuscript found by Ghines, 'Ο ὑπ'ἀριθ. 121 (*supra*, note 32), it was first issued in the year 872. The text that I am quoting, first published by Zachariae von Lingenthal ('Ο Πρόχειρος Νόμος, 32–34), can be conveniently found in Zepos, *Jus*, II, 127–28. I quote, with minor changes, the English translation of paragraph IV, 25, by Jenkins and Laourdas, 'Ελληνικά, 14 (1955), 338–39; and, with considerable changes, the translation of paragraphs IV, 26 and 27, by E. H. Freshfield, *A Manual of Eastern Roman Law. The Procheiros Nomos* (Cambridge, 1927), 62–63. The Greek text of these paragraphs reads as follows: κε' "Ἡδη μὲν οὖν τοῖς ἀρχαίοις γέγραπται νόμος καὶ πρόσγε παρὰ τοῦ εὐσεβεστάτου Ἰουστινιανοῦ κεκῶρται, δι' οὗ καὶ μέχρι τετάρτου γάμου παρεκτείνεσθαι τὰ συνοικέσια τοῖς βουλομένοις· ἴσως καταστοχαζομένου, ὡς τοῖς πολλοῖς εἰκὸς τοῦτο συμβαίνει, τὸ ταχέως τὸ συνοικοῦν πρόσωπον αὐτοῖς ἀποβάλλεσθαι, ἢ καὶ νέους ἔτι τοῦτο παθεῖν, καὶ οὐδὲν ἀνδίστασθαι πρὸς τὰς τῆς φύσεως ὁρμάς, ὥστε τοῦτοις συμβαίνειν τῶν σωφρόνων μὲν γάμων ἀποτρέπεσθαι, φοιτᾶν δὲ εἰς τινὰς μίξεις ἀπηγορευμένας. ἐχρῆν δὲ καὶ ἡμᾶς ὡς τῆς αὐτῆς φύσεως τε καὶ ἀσθενείας κεκοινωνηκότας ἐν τούτῳ τοῖς παλαιοῖς ἐμμεῖναι νόμοις· ἀλλ' ὁρῶμεν θεῖον νόμον ἡμᾶς εἰργοντα. διὰ τοῦτο ἡ ἡμετέρα γαληνότης, ταῖς ἀναιμέναις τῶν ἐρώντων ἐπιθυμίαις ἐπιθεῖναι χαλινὸν βουλομένη, τοσοῦτον ἀπαγορεύει τὸ πρὸς τέταρτον συνοικέσιον ἀφικέσθαι τινά, ὥστε καὶ τοὺς εἰς τρίτον ἐλθόντας τοῖς ἐκκλησιαστικοῖς παραπέμπει κανόνιν. ὥστε οὖν τὰ αὐτὰ δίκαια προβαίνειν καὶ ἐπὶ τοῦ τρίτου συνοικεσίου, ὅποσα καὶ ἐπὶ τοῦ δευτέρου. ἔστω νῦν πᾶσι κατάδηλον, ὡς εἴ τις τολμήσει πρὸς τέταρτον γάμον, τὸν οὐ γάμον, ἐλθεῖν, οὐ μόνον ἀντ' οὐδενὸς ὁ τοιοῦτος νομιζόμενος γάμος λογισθήσεται, οὔτε οἱ ἐξ αὐτοῦ τεχνήντες παῖδες παῖδες γνήσιοι γνωρισθήσονται, ἀλλὰ καὶ ταῖς ποιναῖς τῶν μεμολυσμένων τοῖς τῆς πορνείας ῥυπάσμασι καὶ υποβληθήσεται, ἀπ' ἀλλήλων δηλονότι τῶν τοιούτων προσώπων διίσταμένων.

κς'. Ἐπειδὴ παρὰ τοῖς παλαιοῖς ἀναιμένην εὗρομεν τὴν κοινωνίαν τῆς παλλακῆς πρὸς τὸν βουλόμενον αὐτῇ κοινωνεῖν, οὐκ ἔδοξεν ἡμῖν ἀμνημόνευτον ἔδσαι αὐτήν τὴν νομοθεσίαν, ἵνα μὴ καταχραίνηται ἡμῶν ἡ πολιτεία γάμοις οὐκ εὐπρεπέσιν. ὁθεν κελεύομεν ἀπὸ τοῦ νῦν μηδεὶ ἐξὸν ὑπάρχειν, παλλακίδα ἐν τῷ ἰδίῳ οἴκῳ κατέχειν· μικρὸν γὰρ ἢ οὐδὲν διαφέρειν ἀπὸ τῆς πορνείας νομιζόμεν. ἀλλ' εἰ βούλοιτο αὐτῇ κοινωνεῖν, γαμικὸν ποιείτω πρὸς αὐτὴν συνάλλαγμα κατὰ τὴν τοῦ νόμου ἀκρίβειαν. εἰ μέντοιγε ἀναξίαν αὐτῷ αὐτὴν κρίνοιτο γυναικα ἔννομον κεκλησθαι, μηδεμίαν πρὸς αὐτὴν κατὰ συνουσίαν ἐχέτω κοινωνίαν, ἀλλὰ αὐτὴν ἀποδιώκετω, καὶ λήψοιτο ἢν ἂν ἑαυτῷ κρίνοιτο λυσιτελές. εἰ δὲ σωφρόνως βιοῦν αἰρεῖται, εὐκταῖον ἡμῖν τοῦτο.

κζ'. Μηδεὶς μυστικῶς στεφανούσθω, ἀλλὰ παρόντων πλειόνων. ὁ γὰρ τοῦτο τολμήσας ἐργάσασθαι σωφρονιζέσθω τιμωρούμενος, δηλονότι τοῦ ἱερέως, ὡς ἐν τοῖς ἀπρεπέσιν ἑαυτὸν παρεμβάλλοντος, τὰς ἀξίας εὐθύνας εἰσπραττομένου κατὰ τὴν τῶν ἐκκλησιαστικῶν κανόνων διάταξιν.

the same weaknesses, might well adhere to the ancient laws in this regard; but we see that the sacred law prevents us [from doing so]. For this reason Our Serenity, wishing to bridle the uncontrolled desires of those in love, forbids anyone to proceed to a fourth marriage; so much so, that she orders those who have proceeded to a third to be subject to the canonical penalties of the Church; so that the same writ shall run in the case of a third marriage as in that of a second. Let it now be absolutely clear to all that if any shall dare to proceed to a fourth marriage, which is no marriage, not merely shall such a pretended marriage be of no validity and the offspring of it be illegitimate, but it shall be subject to the punishment of those who are soiled with the filthiness of fornication, it being understood that the persons who have indulged in it shall be separated from one another."

[*Procheiron* IV, 26] "Since we realized that the ancients permitted consorting in concubinage to those who desired a concubine, we thought that we should not ignore this legislation, lest our State should be degraded by such unseemly unions. Wherefore, we decree that henceforward no one shall be permitted to keep a concubine in his house, for we consider that such a proceeding is very little—if at all—different from fornication. If, however, a man wishes to live in common life with his concubine, let him marry her according to the exact prescriptions of the law. But if he considers her unworthy to be called his lawful wife, let him abandon any carnal relations with her and expel her [from his house], and take another [woman] that he thinks suitable to him. If, however, he prefers to live continently, we approve."

[*Procheiron* IV, 27] "No one shall enact the ceremony of marriage in secret, but [shall do so] in the presence of several witnesses. Whoever shall dare such an act shall be corrected by punishment: that is, the priest will be deservedly punished according to the provisions of the ecclesiastical canons because he took part in undue acts."

Paragraph IV, 25, is the first and only piece of civil legislation formally forbidding a fourth marriage. According to what we know from Arethas, no such law existed in 906, but in 907 Leo issued one. The obvious conclusion is that *Procheiron* IV, 25, is part of Leo's novella of 907. This conclusion is strongly supported by internal evidence. The legislator declares that his initial intention was to ratify the ancient law permitting fourth marriages—and we know that this was in fact Leo's intention at the beginning of 907. This initial attitude is explained by the fact that he himself has been (κεκοινῶν-κός in the perfect tense) subject to human weaknesses—a carefully worded reference to Leo's fourth marriage. But he is prevented (from ratifying the law of the ancients) by the sacred law, in other words, by Patriarch Euthymius and his synod who, in fact, issued a declaration on this subject, putting forth the ecclesiastical point of view. The legislator reminds us that he himself has ordered that a third marriage should be subject to the canonical penalties of the Church: this is a direct reference to Leo's novella 90, which contains exactly this provision; and the reminder may have been prompted by the synod's declaration in which third marriages were also attacked. He ends by

formally forbidding fourth marriages and threatening "fearful penalties" for contraveners, carefully stating that this prohibition should become clear to anybody *now*. As was to be expected, his law possessed no retroactive power and consequently did not create any legal or moral problems for those who had already contracted a fourth marriage, including, most conveniently, Leo himself. One could hardly expect a more complete concordance between the contents of *Procheiron* IV, 25, and what we know of Leo's novella of 907 (*supra*, p. 176–81).

Paragraph IV, 26, is an essential supplement to the previous one and most probably belongs to the same legislation of 907. This hypothesis is supported by the fact that IV, 26 is always found in the manuscripts between IV, 25 and IV, 27 (see *infra*), which undoubtedly belong to the legislation of 907. Following the Roman tradition,⁴⁹ Justinian had not forbidden concubinage. On the contrary, a certain legal protection was granted by law to concubines and their children,⁵⁰ in spite of the Church Fathers' outcry against this institution.⁵¹ Leo VI had himself issued a watered-down prohibition sometime in the nineties of the ninth century.⁵² But paragraph IV, 26, of the *Procheiron* is much more precise: it stipulates that a man should either legally marry his concubine or else expel her and break his relations with her. This law is referred to in a scholion, attributed in the manuscripts to Leo (VI), stating that "*now* a man is compelled to expel his concubine whether or not he wishes to."⁵³ The formal prohibition of concubinage was necessary in order to conform with canon law, and also to give real meaning to the prohibition of fourth marriages. What was the point in imposing separation on two persons, one of whom had contracted a fourth marriage, if the man was allowed by law to keep his partner as a concubine?⁵⁴

Paragraph IV, 27, cannot be earlier than the reign of Leo VI, since it is based on the assumption that a marriage cannot but be religiously celebrated (στεφανούσθω); and Leo VI was the first emperor to issue a law establishing the

⁴⁹ Cf. J. Plassard, *Le concubinat romain sous le Haut Empire* (Toulouse-Paris, 1921).

⁵⁰ *CIC, Dig.*, XXV, 7; *CJ*, V, 26; cf. C. St. Tomulescu, "Justinien et le concubinat," *Studi in onore di Gaetano Scherillo*, I (Milan, 1972), 299–326. The Isaurian *Ecloga* (II, 8) seems to uphold this legislation (cf. I. Tornaritis, Παλλακεία, in 'Αρχ.Βυζ.Δικ., I, 2 (Athens, 1931), 404–5; a somewhat different opinion in Cassimatis, "La notion du mariage" (*supra*, note 34). See also the Nomocanon of 883 (Ps.-Photius) in Rhalles-Potles, *op. cit.*, I, 301–9. Several Justinianic dispositions concerning concubinage seem to have been omitted in the *Basilica*, presumably in view of Leo VI's first prohibition (*infra*, note 52). Cf. C. E. Zachariae von Lingenthal, *Geschichte des griechisch-römischen Rechts* (Berlin, 1892), 58 note 52.

⁵¹ Rhalles-Potles, *op. cit.*, IV, 160, 216, 306, 430, 481. Cf. Ph. Koukoules, Βυζαντινῶν Βίος καὶ πολιτισμός, II, 2 (Athens, 1948), 186–88.

⁵² Novella 91: Noailles and Dain, "Les nouvelles de Léon VI le Sage," 298–301. Leo abolishes the laws permitting concubinage, but does not provide any penalties for those who might contravene his novella.

⁵³ Scholion to *Epanagoge* XVI, 27, repeated in the *Epanagoge aucta* XIV, 55: Zepos, *Jus*, II, 276–77 (scholion d); and *Epanagoge* VI, 96: παλλακή . . . ἀποδιωχθήσεται ὑπὸ τοῦ ἀνδρός, κατὰ μὲν τοὺς παλαιούς εἴ γε βούλοιτο ἐκεῖνος, κατὰ δὲ τὸ νῦν καὶ εἰ μὴ βούλοιτο. This scholion further refers to Leo's novella 89: Noailles and Dain, *op. cit.*, 294 note 1.

⁵⁴ The same preoccupation seems to have inspired the simultaneous promulgation of Leo's novellae 90 and 91 (against third marriages; against concubinage): cf. Noailles and Dain, *op. cit.*, 298 note 6.

religious celebration as a *conditio sine qua non* for a valid marriage.⁵⁵ It would seem that this paragraph, too, was inspired by a concrete fact related to the tetragamy: Leo's marriage to Zoe had been blessed "secretly" by a palace priest, who was subsequently deposed by Euthymius for having dared to pronounce this unseemly blessing without the consent of the Holy Synod.⁵⁶ Rather than simply sanction by law a disciplinary measure already taken by his Patriarch, Leo tried to avoid any future embarrassment that might arise should a priest, out of real or feigned ignorance, agree to celebrate secretly a marriage that was illicit. The limited importance of this article would account for the fact that later juridical compilations tend to omit it.

It should be added here that the composition as well as the wording of these three paragraphs strongly suggest that they were borrowed from novella-type originals, either from three different novellae or from three paragraphs of the same novella.⁵⁷ Paragraph IV, 25, preserves a rather long historical introduction in which the Emperor speaks in the first person. This is typical of a novella but quite uncommon in the stark articles that usually compose a code of law. A shorter introduction survives also in paragraph IV, 26. Only in paragraph IV, 27, is a stern admonition written in the imperative; it, too, could come from a novella: Byzantine legal compilations usually reproduce only the *dispositio*—or part of it—of the imperial novellae that were their sources.⁵⁸

EXTERNAL EVIDENCE. What we know of the manuscript tradition of the *Procheiros Nomos* does not contradict the hypothesis that paragraphs IV, 25–27, were added to this code at the beginning of the tenth century. The earliest manuscript used by Zachariae von Lingenthal in his edition of *Procheiron*, cod. Paris. Coislin 209, contains those paragraphs and has been dated only on paleographical grounds to the end of the ninth century; but it could very well belong to the first decades of the tenth century, since the proposed date is nothing more than an approximation based on the style of the script.⁵⁹

⁵⁵ Novella 89: Noailles and Dain, *op. cit.*, 294–97. This novella, with the two that follow it (90 and 91), constitute a group of laws tending to modify civil legislation about marriage to make it conform to the prescriptions of canon law and the wishes of the Church. It could then be argued that novella 89 was issued at the same time as novellae 90 and 91. The gradual introduction of the religious celebration of marriages into the Eastern Church has been studied by Herman (articles listed *supra*, note 6).

⁵⁶ *Vita Euthymii*, 109–11, 113 (τὸν παρὰ κανόνα πράξαντα), 139 (ὡς τολμητίαν, ὡς ἄνευ συνοδικῆς ψήφου πράξαντα). This priest was eventually reinstated by Nicholas Mystikos after 912. Cf. Karlin-Hayter in *Vita Euthymii*, 222, and Grumel, *Regestes*, nos. 625, 629.

⁵⁷ According to Matthaios Blastares (14th cent.), Leo had issued 120 novellae (Rhalles-Potles, *op. cit.*, VI, 30). We have a collection of 113 novellae (Noailles and Dain, *op. cit.*) together with four excerpts from Leo's laws (*ibid.*, 376–78) and a few more excerpts of dubious authenticity and attribution (Zepos, *Jus*, I, 51–53). No conclusion is possible. We have seen (*supra*, notes 54, 55) that at different times Leo issued three distinct novellae about subjects very similar to those treated in 907.

⁵⁸ Cf. A. Pezzana, "Note sulle novelle di Leone VI il Saggio," *Annali di storia del diritto*, 2 (1958), 333–44.

⁵⁹ R. Devreesse, *Bibliothèque Nationale. Catalogue des manuscrits grecs*. II, *Le fonds Coislin* (Paris, 1945), 187–89. I do not think that one can follow J. A. B. Mortreuil, *Histoire du droit byzantin*, II (Paris, 1844), 30, in dating the prototype of the cod. Laudianus 39 (73), containing the *Procheiron*, to the year 901 or 902. The manuscript that we have was written in the 11th century (H. O. Coxe, *Catalogi codicum manuscriptorum bibliothecae Bodleianae*, I [Oxford, 1853], col. 520), and we have no way of knowing from how many prototypes it was copied. A detailed description of the Laudianus 39 is found in Zachariae von Lingenthal, 'Ὁ Πρόχειρος Νόμος, 323–28.

In any case the existence of this manuscript is sufficient evidence that paragraphs IV, 25–27, were probably introduced into the *Procheiron* not later than the first decades of the tenth century.

It has already been argued,⁶⁰ on codicological grounds, that the last six paragraphs of title IV (22–27, including those in which we are interested) may constitute a later addition to this code of law. The reason was that these six paragraphs, together with several others (XXXIII, 30–32; XXXIV, 17; [XXXIX, 79, see *infra*, note 64]), are found separately in the so-called *Epitome Marciana* under a heading qualifying them as novellae of Basil I.⁶¹ Consequently, they have been considered additions based on legislation issued by this Emperor.⁶² Mortreuil has even tried to show that this separate group of paragraphs was the work of a compiler who drew all his information from the *Procheiron* itself;⁶³ but this cannot be readily accepted. On the contrary, there are reasons to suspect that the compiler of the *Epitome Marciana* had in front of him documents other than the *Procheiros Nomos*.⁶⁴

Let us now look more closely at these paragraphs of the *Procheiron* and see whether they could have been added to this code of law after it was first issued, probably in 872 and certainly before 879 (cf. p. 185 note 48). In order to make our point, we shall compare it with other law books of roughly the same period: first, with the *Epanagoge*, which was issued under the names of the Emperors Basil, Leo, and Alexander, that is, sometime between the years 879 and 886, and which “is little more than a new, improved edition of the *Procheiron*”;⁶⁵ second, with the *Epitome legum*, a private collection of rules of law from the year 908/9, or 913/14, or 921, which “gathers most of its materials from sixth- and seventh-century commentaries”⁶⁶ but also reproduces a

⁶⁰ By Zachariae von Lingenthal: see Zepos, *Jus*, II, 126 note 36; 127 note 42.

⁶¹ Published by J. Leunclavius, *Iuris Graecoromani tam canonici quam civilis tomus duo*, ed. M. Freher (Frankfurt, 1596), I, 86–87 (reprinted in Rhalles-Potles, *op. cit.*, V, 253–54); II, 134–35.

⁶² J. S. Assemani, *Bibliotheca juris orientalis canonici et civilis*, II (Rome, 1762), 748–52; Zachariae von Lingenthal, cf. *supra*, note 50.

⁶³ Mortreuil, *op. cit.*, 279f.

⁶⁴ E.g., in one paragraph published by Leunclavius (*op. cit.*, II, 135, § 6) it is stated that “the Emperor Basil the Macedonian, in a novella (νέαρχη) established a mandatory death penalty for anyone committing a premeditated murder, including those holding high imperial titles (the latter’s lives had been respected by previous legislation). Mortreuil (*op. cit.*, 283–84) postulates that this paragraph comes from *Procheiron* XXXIX, 79, although he recognizes that the text of the *Epitome Marciana* is more developed than that of the *Procheiron*. It must be pointed out here that *Procheiron* XXXIX, 79, simply repeats a clause from the Isaurian *Ecloga* (XVII, 45) which does not say at all that capital punishment should also be applied to murderers holding titles; and that this same paragraph is repeated in the *Epanagoge* (XL, 85) and in the *Epitome legum* (XLV, 11). In other words, it is clear that the compiler of the *Epitome Marciana* had in front of him a text different from that in the *Procheiron*—most probably Basil’s novella, in which this Emperor made clear his understanding that the death penalty should be applied to *all* guilty of premeditated murders, including dignitaries. It may be assumed that Basil’s novella had not been in force for long, since the *Basilica* (LX, 39, 3) repeat the traditional differentiation in penalties, based on the social rank of the murderer. In any case, the legislation on premeditated murder was radically modified by Constantine VII (Novella XI: Zepos, *Jus*, I, 232–35) and these new dispositions were generally applied in the 11th century: *Peira*, LXVI, 14, 24, 25, 27; scholion in *Basilica*, LX, 39, 3.

⁶⁵ Scheltema, “Byzantine Law” (as in note 47 *supra*), 66. Text in Zepos, *Jus*, II, 229–368. On the character of the *Epanagoge*, see Ostrogorsky, *History* (as in note 47), 213–14 (with bibliography).

⁶⁶ Scheltema, *op. cit.*, 65. Text in Zepos, *Jus*, IV, 261–585.

selection of clauses from the *Procheiron* and takes into consideration the legislation of Leo VI.⁶⁷

Procheiron IV, 22–27: Since these are the last paragraphs of title IV, if they were added after the Code was first issued, they would not affect the numbering of the other paragraphs. It should be emphasized here that *Procheiron* IV, 1–21, is repeated in its entirety in the text of the *Epanagoge*;⁶⁸ but paragraphs 22–27 appear only in some manuscripts of the *Epanagoge*, either interpolated in title XVI with independent numbering, or as marginal scholia,⁶⁹ or as an addition that is found independently between titles XV and XVI;⁷⁰ Sometimes they are placed under the ambiguous heading τοῦ ἡμετέρου [εὐσεβοῦς] βασιλέως with no indication of the name of the emperor who issued the law. Consequently, there is no doubt that they are additions which do not belong to the original text of the *Epanagoge*.

⁶⁷ The date of the collection is given with variants in its preface (Zepos, *Jus*, IV, 280). Most of the manuscripts used for the edition of Zachariae von Lingenthal (reproduced by Zepos) assert that the compilation was made ἐν τῷ πρώτῳ ἔτει τοῦ εὐτυχοῦς Ῥωμανοῦ βασιλέως—in the first year of the reign of Romanus I Lecapenus, who was crowned, as we now know, on 17 December 920. Consequently, the preface dates to the year 921 (the date of 920, repeated ever since Zachariae von Lingenthal proposed it in the mid-19th century, is based on an erroneous calculation of Romanus' coronation: Zepos, *Jus*, IV, 271). But in one manuscript used by Zachariae von Lingenthal, Laurentianus LXXX, 6, this phrase is omitted and replaced with the following: ἐν τῷ πρώτῳ ἔτει τοῦ εὐτυχοῦς Κωνσταντίνου, τοῦ υἱοῦ Λέοντος τοῦ εὐεργέτου—in the first year of the reign of Constantine VII Porphyrogennetos, who was crowned co-emperor on 15 May 908, and who began to reign alone on 6 June 913. One would tend to discard the date 908/9, since the regnal year of Leo himself should be mentioned first in the date; but another manuscript used by Zachariae von Lingenthal, Vaticanus graecus 640, places the preface under the title τοῦ παρόντος νομίμου τῶν τριῶν βασιλέων (Zepos, *Jus*, IV, 276 note 1), and this very well accords with the dating of the collection to 908/9 since, at that time, there were in fact three emperors, Leo, Alexander, and Constantine VII. And the mention of Constantine VII alone in the preface could be considered as a compliment to his father, who had at last succeeded in producing a male heir and elevating him to the throne. On the other hand, Leo is mentioned several times in the preface (also in the text, cf. *infra*), always as a *living* person: ὁ γαληνότατος καὶ πρῶτατος ἡμῶν βασιλεὺς Λέων (*ibid.*, p. 279, lines 19–20) has revised and simplified the legislation and then issued it for the benefit of all, ὁ καλλίνικος καὶ πρῶτατος ἡμῶν βασιλεὺς (*ibid.*, p. 280, lines 7–8). The author of the compilation goes on to say that he introduced into his *opus* ancient laws that are still valid, as well as those that were confirmed or first issued by “our Emperor” (*ibid.*, p. 280, lines 12–15: τοῖς δὲ ἡμῖν σήμερον . . . νενομοθετημένοις καὶ παρεκβαλλομένοις τοῖς [var. ἐν οἷς] καὶ παρὰ τοῦ ἀεὶ σεβαστοῦ ἡμῶν βασιλέως τιμηθεῖσιν ἢ καὶ νομοθετηθεῖσιν); it is obvious that in this last phrase reference is made to Leo VI, who is mentioned four lines above. Consequently, one may imagine that the *Epitome legum* was first “published” in 908/9; and that a new “edition” was made in 921 (with the appropriate change in the dating clause), an “edition” from which come most of the manuscripts used by Zachariae von Lingenthal for his edition. In any case, what is important for our purpose, is that the *Epitome legum* was composed before 921, and that its author asserts that he took into consideration the legislation of Leo VI.

⁶⁸ This is the concordance of the paragraphs from *Procheiron* IV with those of the *Epanagoge*:

<i>Proch.</i>	<i>Epan.</i>	<i>Proch.</i>	<i>Epan.</i>	<i>Proch.</i>	<i>Epan.</i>
IV, 1	XVI, 1	IV, 9	XVI, 9, 10	IV, 16	XVI, 19
2, 3	2	10	22	17	12
4	3	11	7	18	15
5	13	12	4	19	14
6	26	13	16	20	XVIII, 9
7	6	14	11	21	XVI, 23
8	8	15	5		

⁶⁹ Cf. Zepos, *Jus*, II, 275 note 2.

⁷⁰ Cod. Paris. suppl. gr. 1235, pp. 48–50: Ch. Astruc and Marie-Louise Concasty, *Bibliothèque Nationale. Catalogue des manuscrits grecs. III, Le Supplément grec 3 (Nos. 901–1371)* (Paris, 1960). This is a 19th-century copy made by Mynas Minoïde on a 13th-century manuscript belonging to a priest of Gümüş-hane (Argyroupolis, in the Pontus). Caution is necessary when dealing with Minoïde's copies: cf. A. Dain, “Les manuscrits juridiques de Minoïde Mynas,” *Actes du VI^e Congrès International des Etudes Byzantines*, I (Paris, 1950), 355–58.

Procheiron IV, 22–23: Conditions under which a minor can be forced by his father to marry. These two paragraphs are based on an imperial novella (κατὰ τὰ παρ' ἡμῶν ἀρτίως εὐσεβῶς νενομοθετημένα). They do not appear in the original text of the *Epanagoge*, but are repeated in the *Epitome legum* (XXIII, 35, 36).

Procheiron IV, 24: Modalities to be followed by a woman over twenty-five years of age if she wishes to marry the man of her choice and force her resentful parents to give her her rightful dowry. Wording of a novella, with introduction and *dispositio* (καὶ τοῖς πρὸ ἡμῶν νομοθέταις . . . διὰ τοῦτο θεσπίζομεν). Omitted in the original text of the *Epanagoge*, which simply repeats (XVI, 5) the traditional law as it appears in *Procheiron* IV, 15, which grants to adult women the right to marry without paternal consent, thus ignoring the modalities required for this practice contained in the paragraph of the *Procheiron* under discussion.⁷¹ *Procheiron* IV, 24, is introduced into the text of the *Epitome legum* (XXIII, 8, cf. XXIII, 4) where it is qualified as a "recent" disposition (ἀρτίως). It may be added here that the author of the *Epitome legum* uses the word ἀρτίως in another instance (XXIII, 21) where he refers directly to Leo VI's novella 23 (ἀρτίως δὲ διάταξις γέγονε παρὰ τοῦ εὐσεβεστάτου βασιλέως ἡμῶν Λέοντος . . .).

Procheiron IV, 25–27: The three paragraphs which have been recognized above to be excerpts of Leo VI's legislation of 907 against fourth marriages. Their wording is that of a novella; they do not appear in the original text of the *Epanagoge*; but two of them are quoted (IV, 26) or entirely reproduced (IV, 25) in the *Epitome legum* XXIII, 32, 39–40. We should note here that a scholion of the *Epanagoge* (cf. note 69) seems to put *Procheiron* IV, 26, in relation with Leo VI's legislation.

It seems to me that the preceding information supports the conclusion we have arrived at on the basis of the internal evidence contained in *Procheiron* IV, 25–27: these three paragraphs may well be a later addition, obviously made after the *Epanagoge* was issued (879–86); and there is no decisive evidence against attributing them to legislation issued by Leo VI, provided we accept that this new legislation had been introduced into the *Procheiron* before the compilation of the *Epitome legum*. We have even found some external indications, admittedly very faint, that paragraphs 24 and 26 could be attributed to Leo VI. Lastly, it can be argued that the title τοῦ ἡμετέρου [εὐσεβοῦς] βασιλέως, under which many of the paragraphs of title IV (22–27) appear as interpolations or scholia in manuscripts of the *Epanagoge*, may indicate that the interpolator wished to differentiate between the emperor of his time (presumably Leo VI) and the main author of the *Epanagoge*, who was Basil I. The information, however, is scanty, and medieval legal compilers are sometimes erratic—or, at least, not very easy for us to understand.⁷² It is wise, for the time being, to leave this treacherous ground.

⁷¹ On this subject, see N. Matses, 'Ο γάμος τῆς ὑπεξουσίας κατὰ τὸ Βυζαντινὸν δίκαιον, in 'Επ. 'Ετ. Βυζ. Στ., 37 (1969–70), 34–54.

⁷² This is an old and thorny problem. See F. Wieacker, "Zur Technik der Kompilatoren. Prämissen und Hypothesen," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 89 (1972), 293–323.

CONCLUSION. Leo VI's legislation of 907, introduced first into the *Procheiros Nomos*, then into the *Epanagoge* (in the form of scholia), and then into the text of the *Epitome legum*, remained the standard civil legislation concerning fourth marriages and concubinage until the fall of Byzantium. Paragraphs 25–27 of *Procheiron* IV reappear in the text of the *Epanagoge aucta* (tenth century),⁷³ of the *Ecloga ad Prochiron mutata* (twelfth century),⁷⁴ in the *Prochiron auctum*,⁷⁵ and are still quoted in the fourteenth-century legal handbooks of Matthaïos Blastares⁷⁶ and Constantine Harmenopoulos.⁷⁷ Because of his personal ordeal, Leo VI finally achieved unanimity between canon and civil law on these issues by enforcing canonical penalties for a third marriage (novella 90) and by forcefully dissolving any fourth marriage (*Procheiron* IV, 25). Yet, his legislation was soon overshadowed by the *Tomus Unionis* of 920.⁷⁸

I have tried to demonstrate that *Procheiros Nomos* IV, 25–27, are an interpolated addition to the original text of this code of law, made on the basis of Leo VI's legislation of 907 against fourth marriages. This has been possible because the tetragamy quarrel had become a *cause célèbre* and considerable documentation relating to it has survived. But this conclusion leads inevitably to a question more important and more difficult to answer: namely, are there any other interpolations in the text of the *Procheiron*? Although I have not undertaken any systematic research on this point, there are reasons to suspect that other paragraphs may also be later additions: XIV, 11,⁷⁹ XXXIII, 30–32, XXXIV, 17,⁸⁰ which occur at the end of the respective titles. Moreover, paragraph XI, 4, although it is found in the middle of the title with consistent numbering, could also be a later addition.⁸¹ This last case may be

⁷³ Tit. XIV, § 21, 22, 29: Zepos, *Jus*, VI, 92, 93, 94.

⁷⁴ Tit. II, § 27: Zepos, *Jus*, VI, 235. Cf. J. de Malafosse, "L'Ecloga ad Prochiron mutata," *Archives d'Histoire du Droit Oriental*, 5 (1950), 1–24.

⁷⁵ Tit. IV, § 43, 54, 56: Zepos, *Jus*, VII, 30, 32, 34.

⁷⁶ Rhallès-Potles, *op. cit.*, VI, 161.

⁷⁷ *Constantini Harmenopuli Manuale legum sive Hexabiblos*, ed. G. E. Heimbach (Leipzig, 1851), 532–34 (IV, 9, 33, and 34).

⁷⁸ Cf. *supra*, p. 169. It goes without saying that the *Tomus Unionis* is quoted not only in all canonical, but also in civil legislation of the following centuries: e.g., Scholion to *Basilica* XXVIII, 4, 39; *Prochiron auctum* IV, 55; *Constantini Harmenopuli Manuale legum*, 532.

⁷⁹ Wording of a novella (cf. Zepos, *Jus*, II, 154 note 35); does not appear in the text of the *Epanagoge* but is added in the margin of one manuscript under the heading τοῦ εὐσεβοῦς βασιλέως (cf. *ibid.*, 311 note 2); appears in the *Epitome legum* XVI, 14. *Procheiron* XIV, 11, constitutes a further step in the direction that has already been traced in the Isaurian *Ecloga* (IX, 1): cf. N. Matses, 'Ανάλεκτα ἐκ τῆς Ἐκλογῆς τῶν Ἰσαύρων, in Ἑπ. Ἑτ. Βυλ. Σπ., 28 (1958), 274–77.

⁸⁰ Paragraphs XXXIII, 30, 31, 32, and XXXIV, 17, appear in this sequence in two independent copies, where they are said to belong to a novella of Basil I (Zepos, *Jus*, II, 198 note 152; 202 note 69). They are omitted in the text of the *Epanagoge* but appear in the form of marginal scholia in one manuscript under the heading τοῦ ἡμετέρου βασιλέως (Zepos, *Jus*, II, 344 note 7; 350 note 10). Wording of a novella which presumably dealt with problems related to inheritance *ab intestat*. On XXXIV, 17, see E. F. Brunk, "Kirchlich-soziales Erbrecht in Byzanz. Johannes Chrysostomus und die mazedonischen Kaiser," *Studi in onore di S. Riccobono*, III (1933), 377–423.

⁸¹ Wording of a novella. It stipulates that a marriage can be dissolved by common consent only if both parties (ἐκατέρω) embrace the monastic life. This paragraph does not appear in the text of the *Epanagoge*, which, on the contrary, repeats (XXI, 1) the provisions of Justinian's novella 117, according to which marriage is dissolved if one of the parties (ἑατέρω) retires to a monastery. But one manuscript of the *Epanagoge* XXI, 1, preserves a significant scholion (Zepos, *Jus*, II, 300, schol. α): "One should know that the present law has been renewed by our pious Emperor; this is how his decision (δόγμα) reads," followed by the word-for-word copy of the *dispositio* contained in *Proch.* XI, 4, on

an extremely important indication that the *Procheiron* not only was interpolated, but may also have undergone at least one systematic revision. After all, interpolations or "revisions" are only too natural in a code of law published and transmitted in manuscript form and meant to regulate human behavior; they reflect the continually developing needs and concepts of a society alive and therefore ever changing. The need for detailed investigation of the manuscript tradition of Byzantine legal texts is all the more apparent.⁸²

the requirement that both parties embrace the monastic life. On the other hand, *Procheiron* XI, 4, is found in one manuscript under the heading τῆς νεαρᾶς διατάξεως Βασιλείου, Λέοντος καὶ Ἀλεξάνδρου (Zepos, *Jus*, II, 146 note 27), "from a novella of Basil, Leo, and Alexander," i.e., a novella issued after Alexander's coronation (September-November 879); but we have already seen that the *Procheiron* was certainly published before 879. It may therefore be deduced that the provisions contained in *Procheiron* XI, 4, were first part of a novella issued between 879 and 886 (Basil's death), probably after the publication of the *Epanagoge*; these provisions were later introduced into the *Procheiron* in the form of paragraph XI, 4. Placed in the middle of the title, without any irregularities in numbering, this paragraph must have been added on the occasion of a revision of the Code, a revision that certainly preceded the composition of the *Epitome legum*, in which *Procheiron* XI, 4, is reproduced (XXIV, 4).

⁸² This is not a new problem. See V. Benešević, "Corpus scriptorum iuris Graecoromani tam canonici quam civilis," *Izvestija na Bŭlgarskija Arheologiĉeski Institut*, 9 (1935) (= *Actes du IV^e Congrès Intern. des Et. Byz.*, I), 137-44; Th. Zielinski, "Projet de la création d'un Corpus scriptorum iuris Graecoromani tam canonici quam civilis (en abrégé CSJ)," *SBN*, 5 (1939) (= *Atti del V Congr. Intern. di Studi Biz.*, I), 735-40; J. de Malafosse, "Le problème de l'édition des textes du Jus Graeco-Romanum," *Actes du I^{er} Congrès de la Fédération Internationale des Associations d'Etudes Classiques* (Paris, 1951), 251-54; C. A. Maschi, "Lo stato attuale della storia e delle fonti del diritto bizantino," Περὶ τῶν τοῦ Θ' Διεθνoῦς Βυζαντινολογικοῦ Συνεδρίου Θεσσαλονίκης (Athens, 1956), II, 33-48. Some important works in this direction have appeared since then: *Basilicorum libri LX*, ed. H. J. Scheltema, D. Holwerda, N. Van der Wal (in progress); N. Svoronos, *La Synopsis Major des Basiliques et ses appendices* (Paris, 1964); *idem*, "Remarques sur la tradition du texte de la novelle de Basile II concernant les puissants," *ZVI*, 8-2 (1964), 427-34; *idem*, "Histoire des institutions de l'empire byzantin," *Ecole Pratique des Hautes Etudes, IV^e Section, Annuaire* (1969-70), 331-46; W. Waldstein and D. Simon, "Neuentdeckte Bruchstücke der Epanagoge cum Prochiro composita," *JÖB*, 23 (1974), 145-78; W. Waldstein, "Zur Epanagoge cum Prochiro composita," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 91 (1974), 375-83.